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July 1, 2021

IBLA 2018-117)	DCHD 2013-26
)	Mining Contest No. AAFF 096515
CAREY MILLS v. KURT KANAM)	
)	Private Mining Contest
)	
)	Petition for Interlocutory Appeal
)	Granted in Part and Denied in Part;
)	Order Denying Motion to Dismiss
)	Affirmed

ORDER

Contestees Kurt Kanam and Arthur West pursue an interlocutory appeal from an order of Administrative Law Judge (ALJ) Harvey C. Sweitzer denying Contestees' motions to dismiss a private mining contest brought by Contestant Carey Mills. Mr. Mills bases his standing to bring the private mining contest on a long-running dispute with the Contestees about his ability to cross Contestees' unpatented mining claims to access his neighboring State of Alaska mining claims. In their motions, Contestees argue that Mr. Mills does not have an adverse interest sufficient to support his standing. Specifically, Contestees argue that (1) Federal district court orders issued in 2017 demonstrate that Mr. Mills has no adverse interest sufficient to support a private mining contest, (2) Contestees support Mr. Mills's efforts to upgrade an existing road, such that Contestees and Mr. Mills do not have adverse interests, and (3) Mr. Mills lacks "clean hands" because, despite his argument to the contrary, he has already accessed his State mining claims. ALJ Sweitzer denied the motions to dismiss and then, upon Contestees' request, certified these questions to the Board for interlocutory appeal.

SUMMARY

To bring an interlocutory appeal of a ruling of an ALJ, a party must obtain the Board's permission, which the Board will grant upon a showing that the ruling involves a controlling question of law and that an immediate appeal may materially advance the final decision. Generally, the Board will not grant interlocutory review of evidentiary

rulings or factual disputes. Here, Contestees seek interlocutory review of one legal issue and two factual disputes. The Board grants interlocutory review of the legal issue and denies interlocutory review of the factual disputes.

The controlling legal issue pertains to orders of the United States District Court for the District of Alaska, in which the Court acknowledged uncertainty about the location and condition of an R.S. 2477 right-of-way that Mr. Mills wants to use to cross Contestees' unpatented mining claims. Use of this right-of-way for motorized access to his state mining claims is the basis for Mr. Mills's adverse interest in Contestees' claims. The Board holds that, despite the uncertainty about the validity, location, nature, and extent of the right-of-way, the Court recognized that the right-of-way exists, and Mr. Mills continues to assert a right to motorized use of the right-of-way across Contestees' claims, which is an adverse interest sufficient to establish standing. We therefore affirm the ALJ's ruling on this issue.

BACKGROUND

The Long-Running Dispute Over Mr. Mills's Access to His State Mining Claims

Mr. Mills holds mining claims on State of Alaska lands near Eagle, Alaska.¹ To access those claims, he must cross Federally-owned surface lands overlying unpatented Federal mining claims owned by Contestees.² For mining claims not subject to the 1955 Surface Resources Act,³ such as the claims of the Contestees, the claimants have an exclusive right to possession and enjoyment of their Federal mining claims, subject to reasonable regulation by the BLM and any adverse claim that existed on the date the Mining Law was passed in 1872.⁴ Consequently, Contestees may legally bar Mr. Mills

¹ *Carey Mills v. Kurt Kanam*, 188 IBLA 46, 47 (2016).

² *Id.*

³ 30 U.S.C. § 612(b) (2018).

⁴ *Id.* §§ 22 (“[A]ll valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . . under regulations prescribed by law”), 26 (“The locators of all mining locations . . . situated on the public domain, . . . where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations”); see *George E. Backes*, 193 IBLA 208, 210 (2018) (explaining that “[t]he Mining Law provides the claimant with important property interests but also anticipates ongoing regulation”), *aff'd*, *Backes v. Bernhardt*, No. 1:19-cv-00482-CL, 2021 U.S. Dist. LEXIS 41775 (D. Or. Mar. 5, 2021).

from crossing their claims.⁵ Mr. Mills has been seeking legal access to bring mining equipment across Contestees' claims through administrative and judicial litigation since at least 2010.⁶

To cross Contestees' claims and access his State claims, Mr. Mills seeks motorized use of a section of the Fortymile Station Eagle Trail (Trail), which the State of Alaska designated a Revised Statute (R.S.) 2477 right-of-way in 1998.⁷ R.S. 2477 refers to section 8 of the Act of July 26, 1866, which provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."⁸ "R.S. 2477 has been construed as presenting a free right-of-way 'which takes effect as soon as it is accepted by the State.'"⁹ R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), but valid rights-of-way existing before that time were preserved.¹⁰

⁵ See *Carey Mills, D/B/A Diversified Mining Ventures, LLC*, IBLA 2010-116, at 5-6 (Sept. 9, 2010) (explaining that BLM does not have authority to grant Mills a right-of-way across Contestees' predecessor's unpatented mining claims because they were located before the 1955 Surface Resources Act, 30 U.S.C. § 612(b)); *Carey Mills v. Scott Wood*, AAFP 096515, Motion to Dismiss Granted in Part and Denied in Part; Motion for Summary Judgment Denied at 1 (Oct. 24, 2013) ("[Contestees' predecessor] has the exclusive right to possession and enjoyment of his mining claims and thus may legally bar Mills from crossing his claims.").

⁶ *Carey Mills v. Scott Wood*, AAFP 096515, Motion to Dismiss Granted in Part and Denied in Part; Motion for Summary Judgment Denied at 1 (Oct. 24, 2013); *Mills*, 188 IBLA at 47.

⁷ *Mills v. Wood*, No. 4:10-cv-00033-RRB, at 2 (D. Alaska Mar. 10, 2017) (District Court Notice of Intent to Dismiss); see Alaska Stat. § 19.30.400(d) (identifying the "Fortymile Station – Eagle" as an R.S. 2477 right-of-way that has been accepted by public users).

⁸ Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, 2793 (1976).

⁹ *Mills v. United States*, 742 F.3d 400, 403 (9th Cir. 2014) (quoting *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1077 (9th Cir. 2010) (quoting *Wilderness Soc'y v. Morton*, 479 F.2d 842, 882 (D.C. Cir. 1973))); see *John Kelley v. BLM*, 193 IBLA 245, 250 (2018) ("R.S. 2477 has been characterized as being 'self-executing' because the grant could be accepted by a State or local government without notification to, or approval from, the United States government.").

¹⁰ FLPMA, Pub. L. No. 94-579 § 701(a), 90 Stat. at 2786.

The Trail follows the route of an old telegraph line, but much of it has been overgrown and abandoned, and some of it is not passable by human traffic.¹¹ The State of Alaska has not surveyed or quieted title to the Trail,¹² so it has not been “judicially determined to exist by a court of competent jurisdiction,”¹³ and the precise location of the Trail is unknown.¹⁴ Nonetheless, the parties agree that the Trail crosses the surface of the Contestees’ unpatented mining claims.¹⁵ The parties also agree that the Trail is “the only reasonable physical access” to Mr. Mills’s mining claims.¹⁶

Mr. Mills argues that because the Trail is an asserted R.S. 2477 right-of-way, he is permitted to use it to cross the surface of Contestees’ unpatented mining claims.¹⁷ Mr. Mills has sought access to his mining claims primarily in two forums: in Federal district court, where he has sued to compel access to his claims over the Trail, and before the Department, where he challenges the validity of Contestees’ Federal unpatented mining claims through a private mining contest under 43 C.F.R. § 4.450. This interlocutory appeal arises in the administrative forum, but an understanding of the Federal litigation is illuminative of the jurisdictional challenges raised in this matter, and we review the history of several related proceedings below.

Mr. Mills’s Federal Litigation Seeking Access to His Claims

In 2010, Mr. Mills filed suit in Federal district court against Contestees and several surrounding landowners seeking access to his mining claims. In 2017, after years of litigation, the Federal District Court for the District of Alaska dismissed the lawsuit

¹¹ District Court Notice of Intent to Dismiss at 2.

¹² *Id.*

¹³ *Kelley*, 193 IBLA at 250; *see also American Motorcyclist Assoc.*, 188 IBLA 177, 205 (2016) (“It is now well established, as a matter of Departmental case law, that an R.S. 2477 [right-of-way] will be deemed to exist, for purposes of BLM management of the public lands, where it has been judicially determined by a court of competent jurisdiction or administratively determined by the Department that the requirements of R.S. 2477 have been satisfied.”).

¹⁴ District Court Notice of Intent to Dismiss at 2.

¹⁵ *Id.* at 2.

¹⁶ *See Mills v. Kanam*, AAFF 096515, Clarification at 4 (Nov. 10, 2015) (citing *Carey Mills, D/B/A Diversified Mining Ventures, LLC*, IBLA 2010-116, at 2 n. 5 (Sep. 9, 2010)) (DCHD Clarification Order).

¹⁷ *Carey Mills v. Kurt Kanam*, AAFF 096515, Motions to Dismiss Denied; Mr. Scott Wood Recognized as a Contestee; Historical Context; Sampling August 1, 2017; Sanctions for Failure to Cooperate at 2 (Apr. 10, 2017).

after concluding that “no more effective relief can likely be granted.”¹⁸ The Court stated that, “[f]or purposes of this litigation, the Court, rightfully or wrongfully, based on the designation by the State of Alaska, has assumed that a valid R.S. 2477 right-of-way exists, and that the Trail crosses Defendants’ property.”¹⁹ Based on this assumption, the Court stated that “Defendants are precluded from barring [Mr. Mills] from utilizing the Trail for ingress and egress.”²⁰ That said, the Court explained that no one knows precisely where the Trail lays on the land, and the State “has failed to take action to locate the Trail or to proceed with a quiet title action to conclusively establish its title to the Trail.”²¹ Because the only remaining factual dispute was the location of the Trail, and none of the parties could provide that information to the Court, the Court concluded that further proceedings would be futile.²²

In dismissing the case without prejudice, the Court concluded that Mr. Mills “has the right as a member of the general public to traverse the entire route of the Fortymile Station-Eagle Trail as that Trail existed on the date it was accepted by the State of Alaska,” but “[n]o party hereto may unilaterally construct a road or upgrade the Trail” until the location of the Trail is conclusively established.²³ The Court also noted that, “[w]hile there is considerable hostility among the parties, and disagreement as to their rights and responsibilities, there is no evidence that any of the Defendants physically prohibited [Mr. Mills] from accessing what they believed to be the route of the Trail.”²⁴

Mr. Mills’s Private Mining Contest and Mr. Kanam’s Previous Interlocutory Appeal

In 2012, while Mr. Mills’s Federal lawsuit was proceeding, Mr. Mills initiated this private mining contest in the Departmental Cases Hearings Division (DCHD), seeking a determination that the unpatented Federal claims owned by Contestees’ predecessor,

¹⁸ District Court Notice of Intent to Dismiss at 2; *see also Mills v. Wood*, No. 4:10-cv-00033-RRB, at 6 (D. Alaska May 4, 2017) (District Court Order of Dismissal).

¹⁹ District Court Notice of Intent to Dismiss at 2.

²⁰ District Court Order of Dismissal at 2.

²¹ *Id.* at 3.

²² *Id.* at 6 (“Until the State of Alaska takes action to quiet title to the R.S. 2477 right-of-way it has claimed, it is unlikely that any court can finally resolve the parties’ dispute beyond that declared above”); *see also* District Court Notice of Intent to Dismiss at 1-2 (“It now appears clear that little, if anything, can be accomplished at trial”).

²³ District Court Order of Dismissal at 5; *see id.* at 4 (“[N]o member of the public may construct a road on the Trail and, until the location of the Trail is conclusively established, no member of the public may upgrade what they believe to be the Trail.”).

²⁴ District Court Order of Dismissal at 5.

Scott Wood, are invalid.²⁵ If Mr. Mills prevails in this contest, then Contestees will have no interest in the Federally-owned lands that Mr. Mills seeks to cross using the Trail and therefore cannot legally bar Mr. Mills from crossing those lands in order to access his State mining claims.²⁶

In November 2015, ALJ Sweitzer construed a filing by Mr. Kanam as a challenge to Mr. Mills's standing to bring a private mining contest because Mr. Kanam disputed whether Mr. Mills had "an interest in land adverse" to Mr. Kanam's unpatented mining claims as required by 43 C.F.R. 4.450-1.²⁷ That regulation provides that only a "person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land" may initiate a private contest.²⁸ ALJ Sweitzer rejected Mr. Kanam's challenge, finding that Mr. Mills's adverse interest in Mr. Kanam's claims "stems from at least two separate circumstances": 1) Mr. Kanam "is denying [Mr. Mills] the ability to access his State of Alaska mining claims with mining equipment" by prohibiting Mr. Mills from bringing that equipment across Mr. Kanam's unpatented mining claims; and 2) Mr. Mills "claims an RS 2477 right of way through Contestee's mining claims which, in the State of Alaska, is self-executing and may be asserted by a private individual."²⁹

In February 2016, Mr. Kanam again moved to dismiss the contest, asserting that Mr. Mills's contest sought to establish his own possessory right to the Contestees' Federal claims and the Department lacks jurisdiction to determine rights of possession between rival mining claimants.³⁰ In the alternative, Mr. Kanam requested that ALJ Sweitzer certify the matter to this Board on interlocutory appeal.³¹ ALJ Sweitzer denied the motion to dismiss, explaining that Mr. Mills's private contest sought only to determine whether Mr. Kanam's unpatented mining claims are null and void for lack of discovery of any valuable mineral deposit within their boundaries.³² In the same order, ALJ Sweitzer

²⁵ Complaint (filed Oct. 29, 2012), at ¶ 5. By order dated Jan. 7, 2015, ALJ Sweitzer granted a motion to substitute Kurt Kanam for Scott Wood as Contestee.

²⁶ See *Carey Mills v. Scott Wood*, AAFF 096515, Motion to Dismiss Granted in Part and Denied in Part; Motion for Summary Judgment Denied 1-2 (Oct. 24, 2013).

²⁷ DCHD Clarification Order at 3-4.

²⁸ 43 C.F.R. § 4.450-1 (2020).

²⁹ DCHD Clarification Order at 4.

³⁰ Contestee-Defendant Kanam's Motion to Dismiss or to Certify Appeal at 2 (filed Feb. 24, 2016).

³¹ *Id.* at 1.

³² *Carey Mills v. Kurt Kanam*, AAFF 096515, Motion to Dismiss Denied; Request to Certify for Interlocutory Appeal Granted at 1 (Mar. 3, 2016).

also granted the request by Mr. Kanam to certify both his standing and jurisdictional challenges to this Board.³³

The Board granted Mr. Kanam's request for interlocutory appeal on both motions to dismiss³⁴ and affirmed ALJ Sweitzer's denials.³⁵ The Board agreed with ALJ Sweitzer that the issue in this private mining contest is not the right of possession between adverse mining claimants, but rather the fundamental validity of the Federal mining claims.³⁶ Because the Department has jurisdiction to adjudicate the validity of Federal mining claims, including contests brought by private individuals pursuant to 43 C.F.R. § 4.450, we affirmed ALJ Sweitzer's finding of jurisdiction.³⁷

With regard to Mr. Kanam's challenge to Mr. Mills's standing, the Board looked to precedent requiring that private mining contestants demonstrate that their claim to an adverse "interest in land" as required by 43 C.F.R. § 4.450-1 be "grounded on a specific statutory grant."³⁸ Finding that Mr. Mills's assertion of a right to use the Trail to cross the Federal claims arose from the statutory rights created by R.S. 2477 and preserved in FLPMA, the Board found that Mr. Mills satisfied the requirements of 43 C.F.R. § 4.450-1 and affirmed that Mr. Mills had standing to bring the private mining contest.³⁹ Mr. Kanam timely requested reconsideration of the Board's order, which the Board denied in January 2017.⁴⁰ Mr. Kanam later appealed the Board's order to Federal district court.⁴¹

Contestees' New Motions to Dismiss

After the Board affirmed ALJ Sweitzer's denial of Mr. Kanam's motions to dismiss, and ALJ Sweitzer added Arthur West as a Contestee, Contestees submitted to ALJ Sweitzer several additional challenges to Mr. Mills's standing to bring the private

³³ *Id.* at 2.

³⁴ Order, *Carey Mills v. Kurt Kanam*, IBLA 2016-117, Petition for Interlocutory Appeal Granted; Briefing Schedule Established at 2 (Mar. 23, 2016).

³⁵ *Mills*, 188 IBLA at 50-54.

³⁶ *Id.* at 50-51.

³⁷ *Id.* at 51.

³⁸ *Id.* at 52 (quoting *In re Pacific Coast Molybdenum Co.*, 68 IBLA 325, 334 (1982)).

³⁹ *Id.* at 52-53.

⁴⁰ *Carey Mills v. Kurt Kanam (On Reconsideration)*, IBLA 2016-117-1 (Jan. 23, 2017).

⁴¹ See *infra* notes 48-53 and accompanying text.

mining contest and the Department's jurisdiction to adjudicate it.⁴² The three primary arguments offered were that (1) recent Federal district court orders "demonstrate Mills has no adverse interest sufficient to support this action;"⁴³ (2) Contestees "fully support Mills['s] desire to significantly upgrade the existing road . . . to safely support" Mr. Mills's access to his claims with machinery, such that Mr. Mills has "no adverse interest whatsoever;"⁴⁴ and (3) Mr. Mills "lacks standing or clean hands" because he is lying about being denied access to his claims as evidenced by the Affidavits of Annual Labor he filed for his State mining claims from 2010 to 2016.⁴⁵

By order dated April 10, 2017, ALJ Sweitzer construed these arguments as motions to dismiss and denied them.⁴⁶ Acknowledging the District Court's orders finding uncertainty regarding the validity, location, nature, and extent of the asserted R.S. 2477 right-of-way,⁴⁷ ALJ Sweitzer found that Mr. Mills's

claim of a right to use the right-of-way for motorized access to his state mining claims remains a legitimate claim constituting an adverse interest in Contestees' mining claims sufficient to establish standing, unless and until a court in a legal action involving the State of Alaska resolves these uncertainties and finds that the right-of-way is invalid or does not support such a use.^[48]

⁴² Contestee-Defendants' Motion Re New Authority and Testing Protocols, No. AAFF 096515 (filed Jan. 3, 2017); Contestees' Declaration Re Mills' Lack of Clean Hands, No. AAFF 096515 (filed Jan. 5, 2017); Contestees' Report and Motion to Dismiss, No. AAFF 096515 (filed Feb. 6, 2017); Contestees Declaration Re Communication with Carey Mills, No. AAFF 096515 (filed Mar. 24, 2017).

⁴³ Contestee-Defendants' Motion Re New Authority and Testing Protocols at 1; *see also* Contestees Declaration Re Communication with Carey Mills at 1-3 (quoting District Court orders).

⁴⁴ Contestee-Defendants' Motion Re New Authority and Testing Protocols at 4; *see also* Contestees' Report and Motion to Dismiss at 3 ("We have certified that we do not oppose Mills obtaining the requisite permits for him to construct the road he has (speciously) asserted he seeks to build to access his claims.").

⁴⁵ Contestees' Declaration Re Mills' Lack of Clean Hands at 1; *see also* Contestees' Report and Motion to Dismiss at 4 ("Mills' claims of being denied access are false and fraudulent").

⁴⁶ *Carey Mills v. Kurt Kanam*, AAFF 096515, Motions to Dismiss Denied; Mr. Scott Wood Recognized as a Contestee; Historical Context; Sampling August 1, 2017; Sanctions for Failure to Cooperate (Apr. 10, 2017) (ALJ's Order Denying Dismissal).

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 4.

ALJ Sweitzer also identified factual inconsistencies in the record regarding whether Contestees have, in fact, allowed Mr. Mills to cross their claims.⁴⁹ He also noted numerous statements and communications by Contestees that he found cast doubt on their representations that they intend to grant Mr. Mills access.⁵⁰ Finally, ALJ Sweitzer found that Contestees had failed to make a factual showing that Mr. Mills had submitted fraudulent filings relating to his State mining claims, which was the basis for their argument about “unclean hands,” and that, regardless, Contestees had not shown that such a finding would warrant dismissal of the private mining contest.⁵¹

Contestees’ Second Request for Interlocutory Appeal

Shortly after denying Contestees’ motions to dismiss, ALJ Sweitzer stayed the mining contest pending the outcome of an appeal to Federal court filed by Contestees, challenging this Board’s orders affirming denial of Mr. Kanam’s 2016 motions to dismiss and denying reconsideration of the same.⁵² Contestees then moved to vacate or certify for interlocutory appeal ALJ Sweitzer’s April 10, 2017, order denying their motions to dismiss.⁵³ ALJ Sweitzer denied the motion to vacate and took the motion to certify under advisement during the stay.⁵⁴

Contestees’ Federal court case was dismissed for failure to serve in June 2017,⁵⁵ and ALJ Sweitzer then lifted the stay and ordered subsequent briefing in the mining contest.⁵⁶ Contestees later re-filed their case in Federal court, but that case was also dismissed, in July 2018, on the basis that the Federal court lacked jurisdiction because the Department had not taken final agency action on the matter.⁵⁷

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 4-6.

⁵¹ *Id.* at 7.

⁵² *Carey Mills v. Kurt Kanam*, AAFF 096515, Proceeding Stayed (Apr. 25, 2017).

⁵³ Contestees’ Stipulation to Stay, Motion to Vacate, and Further Request for Recusal (filed May 1, 2017).

⁵⁴ *Carey Mills v. Kurt Kanam*, AAFF 096515, Motion to Vacate Denied; Motion for Certification and Objection Taken Under Advisement (May 4, 2017).

⁵⁵ *Kanam v. Dep’t of the Interior*, No. 4:17-cv-00010-SLG (D. Alaska June 29, 2017).

⁵⁶ *Carey Mills v. Kurt Kanam*, AAFF 096515, Stay Lifted; Sampling Scheduled; Time for Response (Aug. 25, 2017).

⁵⁷ *Kanam v. Dep’t of the Interior*, No. 4:18-cv-00003-SLG (D. Alaska July 18, 2018); *Kanam v. Dep’t of the Interior*, No. 4:18-cv-00003-SLG (D. Alaska June 11, 2018) (Order to Show Cause and Notice of Intent to Dismiss).

By order dated April 11, 2018, ALJ Sweitzer revisited and granted Contestees' request to certify for interlocutory appeal the April 10, 2017, denial of the motions to dismiss. ALJ Sweitzer found that the following three grounds on which Contestees sought dismissal involve controlling issues of law such that contrary rulings would dispose of this proceeding: (1) rulings from the United States District Court for the District of Alaska, which Contestees argue divest DCHD of jurisdiction; (2) the Contestees' written statements indicating that they will allow Mr. Mills to build a road through their claims; and (3) the theory that Mr. Mills lacks clean hands.⁵⁸

ANALYSIS

Standards Governing Interlocutory Appeals to the Board

There is no right to appeal an ALJ's interlocutory ruling to this Board.⁵⁹ Rather, the relevant Departmental regulation provides, in pertinent part, that

[t]here shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision.^[60]

While the regulation does not expressly identify the standard to be applied by an ALJ in determining whether to certify a ruling, the Board has recognized that "the ALJ should be limited to the same standard applicable to the Board": there must be a controlling question of law, resolution of which would materially advance the final decision.⁶¹

⁵⁸ *Carey Mills v. Kurt Kanam*, AAFF 096515, Request to Certify for Interlocutory Appeal Granted in Part; Revised Sampling Procedures for August 1, 2018; Sanctions for Failure to Cooperate; Time to Respond to Contestant's Proposed Changes to Sampling Procedures at 2 (Apr. 11, 2018).

⁵⁹ *Kendall Nutumya*, 180 IBLA 371, 373 (2011).

⁶⁰ 43 C.F.R. § 4.28 (2020).

⁶¹ *Western Watersheds Project v. BLM*, 164 IBLA 300, 303-04 (2005).

The Board has consistently stated that “interlocutory appeals are generally viewed with disfavor.”⁶² We have identified a number of reasons for this, including that the pendency of an interlocutory appeal during continued proceedings before the ALJ “necessarily infests the ongoing hearing with an undesired tentativeness” that may make the participants reluctant to commit resources of time and money to continue the proceedings, while staying such proceedings during “consideration of the interlocutory appeal may retard rather than advance final decisionmaking.”⁶³ Additionally, interlocutory appeals could “undermine the authority and respect properly accorded to Administrative Law Judges . . . thereby leading to even greater disruptions of both the hearings and appeals processes.”⁶⁴ For these reasons, the governing “regulation, by its terms, severely limits interlocutory appeals only to questions of controlling law whose proper resolution would materially advance final decisionmaking.”⁶⁵

*We Grant Interlocutory Appeal of the Issue Concerning Rulings from the
United States District Court and Deny Interlocutory Appeal of Factual Disputes*

ALJ Sweitzer granted Contestees’ request to certify for interlocutory appeal three issues that he determined involve controlling issues of law such that contrary rulings would dispose of this proceeding: (1) rulings from the United States District Court for the District of Alaska; (2) the Contestees’ written statements indicating that they will allow Mr. Mills to build a road through their claims; and (3) the theory that Mr. Mills

⁶² *Yates Petroleum Corp.*, 136 IBLA 249, 250 (1996); see *Kendall Nutumya*, 180 IBLA at 374 (“[T]he Board has generally viewed interlocutory appeals with disfavor.”); *United States v. Kelly Armstrong*, 144 IBLA 331, 334 (1998) (“[F]or a variety of reasons, interlocutory appeals are generally viewed with disfavor.”); see also *Yates Petroleum Corp.*, 136 IBLA at 251-52 (discussing limited situations in which the Board had “entertained petitions for interlocutory review which arose out of evidentiary rulings” by ALJs).

⁶³ *Yates Petroleum Corp.*, 136 IBLA at 250; see also *Kelly Armstrong*, 144 IBLA at 334 (explaining that interlocutory appeals “are disruptive to the orderly processing of appeals both by the Board and the Hearings Division, . . . and . . . they may, in fact, actually retard rather than advance ultimate decision-making”).

⁶⁴ *Yates Petroleum Corp.*, 136 IBLA at 250.

⁶⁵ *Id.* at 250-51; see also *Kelly Armstrong*, 144 IBLA at 334 (quoting *Yates Petroleum Corp.*, 136 IBLA at 251, and explaining that the phrase “controlling issue of law” refers to “a determination by an [ALJ] which, if left undisturbed, would necessarily result in a specific disposition of the underlying proceeding”).

lacks clean hands.⁶⁶ Although the ALJ certified these issues to the Board, that fact alone does not entitle Contestees to appeal to the Board.⁶⁷ Contestees have not sought the Board's permission to hear their interlocutory appeal, and both the ALJ's certification and Contestees' request for permission are required under the Department's regulation.⁶⁸ Nevertheless, we exercise our discretion to construe the Contestees' filings with the Board to implicitly include a request for the Board's permission to proceed.⁶⁹ Accordingly, we proceed to decide whether all three issues identified by the ALJ will be considered by the Board.

We agree with ALJ Sweitzer's determination that resolution of the first issue raised in this interlocutory appeal—whether the rulings from the United States District Court for the District of Alaska divest DCHD of jurisdiction—is a controlling question of law that would materially affect the outcome of the contest. We therefore grant interlocutory appeal on that issue and discuss it in the following section of this Order.

As to the other two issues raised, we deny Contestees' request for interlocutory appeal because both are disagreements with factual determinations made by the ALJ. As we noted above, interlocutory review of factual determinations would serve to undermine the authority of ALJs and give rise to increased numbers of interlocutory petitions, negatively impacting the work of the ALJs and the Board.⁷⁰ This is, in part, why the rule governing interlocutory appeals before the Board "severely limits interlocutory appeals only to questions of controlling law whose proper resolution would materially advance final decisionmaking."⁷¹ While the Board may review factual disputes in the context of an appeal from a final determination of an ALJ, we will not adjudicate them in an interlocutory appeal.⁷²

With respect to the Contestees' written statements indicating that they will allow Mr. Mills to build a road through their claims, ALJ Sweitzer weighed the factual evidence

⁶⁶ *Carey Mills v. Kurt Kanam*, AAFF 096515, Request to Certify for Interlocutory Appeal Granted in Part; Revised Sampling Procedures for August 1, 2018; Sanctions for Failure to Cooperate; Time to Respond to Contestant's Proposed Changes to Sampling Procedures at 2 (Apr. 11, 2018).

⁶⁷ 43 C.F.R. § 4.28 (2020).

⁶⁸ *Id.*

⁶⁹ See Contestees' Stipulation to Stay, Motion to Vacate, and Further Request for Recusal at 1 (filed May 1, 2017) (stating that Contestees "move to vacate or certify for appeal to the IBLA").

⁷⁰ *Yates Petroleum Corp.*, 136 IBLA at 250.

⁷¹ *Id.* at 251.

⁷² *Id.* at 252 (refusing to consider an ALJ's evidentiary ruling in an interlocutory appeal).

before him and determined that the evidence casts doubt on Contestees' genuine interest in permitting Mr. Mills to cross Contestees' unpatented mining claims.⁷³ Despite Contestees' declarations of support for Mr. Mills's plans to access his mining claims, ALJ Sweitzer found that email correspondence between the parties caused him "to wonder whether Contestees are genuinely interested in reaching a settlement agreement" with Mr. Mills and therefore denied their motions to dismiss based on their declarations.⁷⁴ Whether or not Contestees actually consent to Mr. Mills's access is a question of fact, and it is not an appropriate basis for interlocutory appeal.

With respect to the theory that Mr. Mills lacks "clean hands," ALJ Sweitzer examined the parties' competing submissions to determine whether Mr. Mills "is either fraudulently attesting to work he has not actually done on the claims, or regularly accessing the claims despite his assertion that Contestees are preventing him from doing so."⁷⁵ The ALJ concluded that Contestees had not shown "some technical defect in [Mr. Mills's] annual labor calculations" or that Mr. Mills had accessed his claims.⁷⁶ Again, this is a factual determination, not a controlling question of law appropriate for interlocutory appeal.

Because two of the three issues the ALJ certified are factual findings only and not controlling legal issues, we deny interlocutory appeal of those two issues.

*We Affirm the ALJ's Ruling that the District Court Orders
Do Not Affect the Department's Jurisdiction Over the Private Mining Contest*

In their submissions to the ALJ, Contestees argued that the District Court's orders in 2017, ending Mr. Mills's lawsuit seeking to establish access to his State mining claims, undermine Mr. Mills's standing and therefore the Department's jurisdiction over the private mining contest. In the March 2017 Order and Notice of Intent to Dismiss, the District Court acknowledged that, "[a]bsent a current survey, the Court cannot say, with any certainty, where the Trail runs today, whether or not the Trail is passable throughout by human traffic, or even whether or not the Trail actually touches [Mr.

⁷³ ALJ's Order Denying Dismissal at 6.

⁷⁴ *Id.*; see also *Carey Mills v. Kurt Kanam*, AAFF 096515, Notice of Hearing; Final Post-Teleconference Scheduling Order 2-3 (Feb. 24, 2021) ("Contestees have not allowed Contestant to traverse their claims with mining equipment along any path, including an as-yet unfixed R.S. 2477 right-of-way. Contestees have also refused to stipulate to the path of the R.S. 2477 right-of-way.")

⁷⁵ ALJ's Order Denying Dismissal at 6.

⁷⁶ *Id.* at 7.

Mills’s] mining claims.”⁷⁷ Contestees argued that, consequently, the Trail cannot serve as the basis for Mr. Mills’s standing to bring a private mining contest: “The ‘right of way’ that Mills’[s] standing rests upon in this action is not even known to definitely exist to the extent that it would reasonably afford Mills standing to maintain this action.”⁷⁸ Contestees concluded that “[t]his case should be dismissed for lack of standing as Mills . . . has no definite interest in an impassable footpath that cannot be located with any degree of certainty”⁷⁹

ALJ Sweitzer examined the District Court’s orders and concluded that nothing in them affects the validity of the Board’s and DCHD’s prior orders ruling that “Mr. Mills’s claim of a right to use an asserted R.S. 2477 right-of-way across Mr. Kanam’s unpatented mining claims so that he can access his State mining claims is an assertion of an interest in land, grounded on a specific statutory grant, adverse to Mr. Kanam’s interests,” sufficient to establish his standing to bring a private mining contest under 43 C.F.R. § 4.450-1.⁸⁰ The ALJ ruled that Mr. Mills’s claim of a right to use the Trail for motorized access to his State claims “remains a legitimate claim constituting an adverse interest in Contestees’ mining claims sufficient to establish standing, unless and until a court in a legal action involving the State of Alaska resolves these uncertainties and finds that the right-of-way is invalid or does not support such a use.”⁸¹

Assuming—like the ALJ and the District Court did—that Mr. Mills needs to use the Trail to access his State mining claims, we agree with the ALJ’s ruling. While the District Court acknowledged the uncertainties about the precise location of the Trail and whether it is passable, it nonetheless stated that, until the State’s designation of the Trail as an R.S. 2477 right-of-way “is challenged in a court of law where the State of Alaska is a party, the right-of-way presumptively exists” and Mr. Mills, as a member of the public, “has the right to utilize the Trail for ingress and egress as it was customarily used and over the route of the telegraph line.”⁸² The District Court’s orders therefore expressly

⁷⁷ District Court Notice of Intent to Dismiss at 4.

⁷⁸ Contestees’ Declaration Re Communication with Carey Mills at 3; *see id.* (“Unlike the cases that this board relies upon for its claim of jurisdiction, where a passable right of way was known to exist in a certain location, in this case there is no certainty that any right of way even approaches Mills’ claim, or that a century old unmaintained telegraph line is even passable to foot traffic.”).

⁷⁹ *Id.* at 4.

⁸⁰ ALJ’s Order Denying Dismissal at 3 (quoting *Mills*, 188 IBLA at 53).

⁸¹ *Id.* at 4.

⁸² District Court Notice of Intent to Dismiss at 2-3; *see also* District Court Order of Dismissal at 5 (concluding that Mr. Mills “has the right as a member of the general

acknowledged, rather than undermined, Mr. Mills’s right to use the asserted R.S. 2477 right-of-way, which—regardless of the uncertainties acknowledged by the Court—the parties agree crosses Contestees’ unpatented mining claims.⁸³ Accordingly, Mr. Mills continues to have standing based on his claim of a right to use an asserted R.S. 2477 right-of-way across Contestees’ unpatented mining claims to access his State claims.⁸⁴

CONCLUSION

The Board grants interlocutory appeal on the issue of whether orders of a Federal District Court invalidated the Department’s jurisdiction over Mr. Mills’s private mining contest and affirms the ALJ’s ruling that they did not. We deny interlocutory appeal of the two remaining issues because they are not controlling issues of law. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁸⁵ we grant the request for interlocutory appeal in part, deny it in part, and affirm the ALJ’s denial of Contestees’ motions to dismiss for lack of jurisdiction.

/s/

Silvia Riechel Idziorek
Administrative Judge

I concur:

/s/

Gregg D. Renkes
Administrative Judge

public to traverse the entire route of the Fortymile Station-Eagle Trail as that Trail existed on the date it was accepted by the State of Alaska”).

⁸³ ALJ Dismissal Order at 2 (“No one disputes that the right-of-way traverses Contestees’ [F]ederal mining claims and Contestant claims a right to use it so that he can access his state mining claims with motorized equipment.”).

⁸⁴ See *Mills*, 188 IBLA at 53.

⁸⁵ 43 C.F.R. § 4.1 (2020).